IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 590 of 2002

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA

HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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THAKORE BHALAJI @ SOMAJI GANDAJI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR DK DESAI for Appellant(s) : 1,
MS ML SHAH APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 01/05/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1. This appeal under Section 374 of the Code of Criminal Procedure has been preferred by the present appellant-accused being aggrieved and dissatisfied by the judgment and order of conviction dated 07.06.2002 passed by the learned Additional Sessions Judge, Mehsana in Sessions Case No.1 of 2002 whereby he was sentenced to undergo rigorous imprisonment for life and to pay fine of Rs.200/-, in default, to undergo five days S.I. for the charge under Section 302 of the Indian Penal Code. However, he was acquitted for the charge under Section 504 of the Indian Penal Code.

2. When this matter came up for admission before the the Court (Coram : D.K. Trivedi, J, as he then was & J.R. Vora, J.) on 03.05.2003 and 06.05.2003, the learned counsel for the appellant-accused did not remain present and, hence, the matter was adjourned. Record shows that thereafter, the matter has not been reflected in the admission board in any of the Courts and no efforts have been made by anybody for placing the matter on admission board and today, this matter has been listed in our Court

for admission.

3. The case of the prosecution in short is that on 04.10.2001 at about 9:45 a.m., when the deceased along with the other was standing very near to Bahuchar Pan Galla situated in Visnagar town, the appellant-accused armed with Gupti came and gave 5 to 6 blows of gupti on the vital part of the body of the deceased. At that time, other persons and the brother of the deceased standing near Khodiyar Pan House which is opposite to the place of incident rushed there and took the victim to Civil Hospital, Visnagar in autorickshaw and the brother of the deceased went to his house for calling their nearer and dearer and, thereafter, he also went to Civil Hospital along with his family members. On examination, doctor declared the victim dead. Meanwhile, the Hospital Authority telephonically has informed Visnagar Police Station and, hence, complaint being C.R.No.359/2001 came to be registered with Visnagar Police Station for the offence under Sections 302 and 504 of the Indian Penal Code.

4. On the basis of the complaint, P.S.O. of Visnagar Police Station has made endorsement and handed over the investigation to P.I., Mr.Parmar. In pursuance of that, Mr.Parmar went to Civil Hospital, Visnagar

and prepared inquest panchnama in the presence of panchas and also filled up Maranottar Form and sent the dead body for postmortem to the concerned doctor. After completion of the postmortem, the doctor issued certificate to that effect. Meanwhile, the Investigating Officer went to the scene of offence and prepared panchnama of scene of offence and also recorded the statements of various witnesses including the owner of Pangalla and other witnesses, who were present at the time of incident and, thereafter, as the accused has voluntarily surrendered himself before the Visnagar Police Station, Investigating Officer called the panchas and arrested the accused by preparing panchnama to that effect. The clothes worn by the deceased at the time of incident were seized under the panchnama. As the appellant-accused has shown willingness to produce muddamal gupti used by him in the crime in question, he called two panchas and prepared the preliminary panchnama in the Visnagar Police Station itself and, thereafter, went to the place, where the accused has hidden the muddamal Gupti in a Government vehicle at the instance of accused, where the appellant-accused took out Gupti and same has seized under the panchnama. Thereafter, the appellant-accused was sent to

judicial custody. He also recorded the statements of various witnesses and sent the muddamal seized from the place of offence and clothes worn by the appellant-accused as well as the deceased at the time of incident to FSL along with the forwarding letter. On arrival of the FSL report and P.M. report as well as certificate and other papers, same were kept with the investigation file. After completion of the investigation, the Investigating Officer submitted charge-sheet before the Learned Judicial Magistrate, First Class, Visnagar. Since the case registered against the appellant-accused was exclusively triable by the Court of Sessions, the Learned Judicial Magistrate, First Class, Visnagar committed the case to the Court of Sessions, Mehsana under Section 209 of the Criminal Procedure Code. On receiving the same, it has been numbered as Sessions Case No.1 of 2002 and same has been sent into the Court of Learned Additional Sessions Judge, Mehsana for disposing the same on merits. On production of the appellant-accused, the Learned Additional Sessions Judge, Mehsana framed charge against the accused for the offence under Section 302 of the Indian Penal Code, wherein he pleaded not guilty and claimed to be tried.

5. To prove the case against the appellant-accused,

the prosecution has examined as many as 14 prosecution witnesses and has also produced 31 documentary evidences during the course of trial.

6. On submission of the closing pursis by the Learned A.P.P. and after recording the statements of the appellant-accused under Section 313 of the Criminal Procedure Code, the Learned Additional Sessions Judge, Mehsana was of the view that the prosecution has successfully established the guilt against the appellant-accused for having committed offence punishable under Sections 302 of the Indian Peal Code and, therefore, he accordingly, passed the order of conviction and sentence against the appellant-accused as stated hereinabove.

7. Being aggrieved by the Judgment and Order of conviction and sentence awarded by the trial Court, the appellant-accused has preferred this appeal.

8. We have heard learned counsel, Mr.D.K. Desai for the appellant-accused and learned Additional Public Prosecutor, Ms. M.L. Shah for the State. We have been taken through the record and proceedings by both the sides.

9. Learned counsel for the appellant-accused, Mr.Desai took us through each and every oral evidence of the witnesses as well as the documentary evidences, more particularly, panchnama of scene of offence

and discovery panchnama and vehemently argued that the complainant who claimed to be an eyewitness as such is not an eyewitness, but is a got up witness. Taking us through FIR, oral evidence of complainant and detailed cross-examination, it is argued that since his shop is situated 2-3 Kms. away from the scene of offence, in usual course, he will be available there at the relevant time. He has also concentrated his arguments upon the conduct of the complainant and argued that looking to his conduct, his evidence should not be believed. He is the brother of the deceased and an interested witness who has not taken care to even take his brother to the hospital and, therefore also, his presence creates doubt. In this regard, he has placed reliance upon the judgments reported in 2002 SAR (Criminal) 632 (Head Note-B) and 2004 SAR (Criminal) 673 (Head Note-B). It is further argued that another witness, who is nephew of the deceased is a chance witness. He has taken us through the evidence of P.W.No.2 viz., Pravinji @ Parbatji Mansangji at Exh.8 and argued that he was doing masonry work and, therefore, in normal circumstances, his presence at Pan shop at 9:45 a.m. is doubtful and, hence, he is also a chance witness. Simultaneously, he has also taken us

through the evidence of owner of Khodiyar Pan Galla i.e. P.W.No.3 viz., Khodaji Lavingji at Exh.9 and argued that he cannot be the witness of incident as he was busy in preparing pan etc., and if his evidence is believed then also, it can be said that he saw the appellant-accused while giving blows to the deceased from his back side and, therefore, he cannot identify the appellant-accused and, hence, his evidence is required to be discarded. As far as evidence of other witnesses are concerned, it is argued that they have not supported the case of the prosecution and, therefore they are required to be ignored. As far as the discovery panchnama is concerned, it is argued that as such it is not a discovery panchnama, but is a recovery panchama and for which he has taken us through the evidence of both the panchas. Simultaneously, he has also taken us through the panchnama of scene of offence along with the evidence of both the panchas and argued that the place of offence is very near to Khodiyar Pan House Galla. Simultaneously, he has also taken us through the evidence of FSL expert, Mr.Modi along with the FSL report and argued that the blood found on the clothes of the deceased as well as of the accused, the muddamal gupti and at the place of offence is of group 'B'. The blood group of the

victim as well as the appellant-accused is 'B' group and, therefore, according to him, at the time of sending the dead body of the deceased for postmortem, Investigating Officer has requested for sample of the blood of the deceased and according to him, same has been sprinkled upon the muddamal Gupti alleged to have been used by the appellant-accused into the crime in question as well as seized from the accused and, therefore, if any blood has been found on the above referred muddamal, it is not required to be believed as it is concocted one. After taking us through the medical evidence of Dr.Chaudhary as well as P.M. Note, it is argued that there is a variation between the evidence of doctor as well as evidence of eyewitness and, therefore, benefit should go to the appellant-accused. Mr.Desai has, therefore, urged that the present appeal deserves to be allowed and the judgment of conviction and sentence as pronounced by the learned trial Judge requires to be set aside.

10. Ms.Shah, learned Additional Public Prosecutor, who appears on behalf of the opponent-State has taken us through the reasoning of the learned Additional Sessions Judge and submitted that no interference is called for as the prosecution has established

the case against the appellant-accused beyond reasonable doubt. It is submitted by the learned A.P.P. that there are sufficient evidence available on record to connect the appellant-accused with the crime in question. Ms.Shah has, therefore, urged that the learned trial Judge was perfectly justified in coming to the conclusion that the appellant-accused has committed the crime. Raising the abovesaid contentions, Ms.Shah has urged that the present appeal deserves to be dismissed.

11. We have gone through the oral as well as documentary evidence and the reasoned judgment delivered by the Court below shown to us by the learned counsel for the respective parties. Before we proceed with the matter, first of all, we would like to deal with the evidence of P.W.No.7 viz., Dr.Mansinhbhai Laljibhai Chaudhary, who was examined at Exh.20. This witness deposed that he was discharging his duty as Medical Officer, General Hospital, Visnagar on 04.10.2001, where the deceased was taken in an autorickshaw. Upon examination, this witness declared him dead. Thereafter, on receiving the inquest panchnama, Maranotar Form and yadi from the concerned Police, he started postmortem at 14:30 and completed at 16:30. This witness has narrated the external

injuries in his oral evidence at page no.2, which are six in number. He has also proved the same after proving the postmortem note, more particularly, Col.No.17. He has also proved certificate given by him as Exh.22, P.M.Note at Exh.21 and yadi for postmortem at Exh.23. This witness categorically opined that injuries received by the deceased are sufficient to cause his death in ordinary course of nature. He has also deposed that the injury nos.1 to 4 were serious injuries on the vital parts of the body of the deceased and it was corresponding one along with the injury which has been narrated in Col.No.20 of the panchnama. This witness has been cross-examined, but nothing turns on it. Even, it has not been challenged that it is a case of homicidal. We have gone through the evidence of Dr.Chaudhary, which shows that the injuries mentioned in P.M. Note can be possible by way of muddamal gupti and since injuries were on the vital parts of the body, the lung and heart both were punctured. We have also gone through the inquest panchnama, Maranottar Form, evidence of eyewitnesses, which prove that it is a case of homicidal death. The Court below has rightly dealt with the same and, hence, we are not discussing further into the matter. Once it has been proved

that it is a case of homicidal death then question arises whether for that appellant-accused can be held responsible or whether the prosecution has been able to connect with the appellant-accused with the crime in question or not and for which, the evidence of other eyewitnesses are required to be dealt with.

12. As far as P.W.No.1 viz., Manuji Mafaji Thakore, Exh.6 is concerned, this witness has deposed in his evidence that on 01.10.2001 at about 9:45 a.m., when his brother i.e. the deceased was standing at Khodiyar Pan Galla, the appellant-accused came with Gupti and told his brother that why he has sent him into jail and, thereafter, the accused gave 5-6 blows of Gupti on various parts of the body of the deceased and, therefore, his brother fell down. At that time, Thakor Khodaji Lavingji, Parbatji Mansangji, Arvindji, Vikramji and other persons, who were present there reached the scene of offence, took the deceased to Civil Hospital, Visnagar, where the doctor declared him dead. He has also deposed regarding the enmity between the deceased and appellant-accused. This witness has shown the scene of offence to the Investigating Officer and, accordingly, scene of offence panchnama was prepared in the presence of panchas.

This witness has identified the muddamal Gupti as well as the appellant-accused before the Court. In the cross-examination of this witness in paragraph 3, learned advocate for the appellant-accused has asked question regarding the place of incident, road and other places and same has been replied by him. It is admitted by this witness that when the deceased was assaulted by the appellant-accused, he was 20 ft. away from the scene of offence and when he reached there, the appellant-accused ran away with Gupti towards Lavarish road. Certain questions have been asked regarding his conduct as well as the injuries sustained by the victim, but except one line denial, nothing contrary has come out so as to shake his evidence.

13. As far as star witness i.e. P.W.No.3 viz., Khodaji Lavingji, Exh.9 is concerned, he has deposed that he is the owner of the Khodiyar Pan Gallo and at the time of incident, he was there in his pan shop. In paragraph no.2 of his chief-examination, he was categorically deposed that at the relevant time, the victim, Bhanuji Mafaji came to his pan shop on scooter for pan-masala and after taking pan-masala, he was standing near to his pan shop and at that time, the appellant-accused came there with gupti and was assaulting the deceased from his back side.

Rest of the things have not been supported by him in his chief-examination on the ground that thereafter he became unconscious. This witness has also deposed that the deceased was taken to Hospital and, thereafter, he came to know that the deceased succumbed to the injuries. This witness identified the appellant-accused before the Court. This witness in his cross-examination has admitted that at the time of incident, he was preparing a pan and after hearing shouts, his attention has been drawn towards the incident, where he saw that the deceased fell down due to injuries received by him and other persons viz., Manuji, Arvindji and Pravinji came there. As per the evidence of this witness, he is a star witness and is also an independent witness having his pan shop. He has nothing to do with the appellant-accused or the victim and, therefore, his evidence has much more value than the other witnesses. On material point, he has totally supported the say of the prosecution. As per his deposition, he was knowing all the persons i.e. the witnesses, victim and accused and in cross-examination, he has admitted that Manuji, Arvindji and Pravinji reached the place of offence. This means the theory of the other side that the Manuji was not there at all as

his shop is located 3-4 Kms. away from the scene of offence and he is a got up witness is not trustworthy. From the deposition of this witness, presence of Manuji is established.

14. As far as P.W.No.2 viz., Pravinji @ Parbatji Mansangji, Exh.8 is concerned, his presence is also established from the evidence of independent witnesses. This witness has categorically deposed that before the incident, altercation took place between the deceased and the appellant-accused and, thereafter, the appellant-accused gave Gupti blow to the victim. He has also deposed that Manuji, Vikramji, Khodaji along with other persons reached the place of offence and, thereafter, they took the victim to Government Hospital in a autorickshaw. His statement was recorded by the Investigating Officer on the same day. This witness has identified the muddamal Gupti as well as the appellant-accused before the Court. Other side has tried to establish by way of cross-examination that he is doing masonry work and, hence, usually he will be at his work place from 8 to 12. But in the cross-examination, it has been established that on the date of incident as he has to purchase cement, he came to the scene of offence and he was standing near Bahuchar Pan House, which is approximately 20

ft. away from the place of offence and saw the incident in question.

15. As far as P.W.No.13 viz., Arvindji Laxmanji, Exh.39 is concerned, he is the nephew of the deceased and has also supported the case of the prosecution. In his cross-examination, he has admitted that when they went to the scene of offence, people have gathered there and victim was lying there and, therefore this witness along with others took the victim to the Hospital. From the evidence of this witness, it appears that he is the person, who reached the scene of offence after the incident at the earliest, but he cannot be claimed to be an eyewitness.

16. The prosecution has placed reliance upon the above referred witnesses, wherein Mr.Desai has vehemently argued that all the witnesses are got up ones as they were not present and are interested persons. As discussed above, out of four, two are relatives of the deceased and two are independent witnesses and all the witnesses have supported the case of the prosecution on material point regarding the incident and narrated the same in detail. All have categorically deposed that when the victim was standing near Khodiyar Pan House Galla, the appellant-accused came there and some altercation

took place and, thereafter, he gave 5-6 gupti blows on vital parts of the deceased and as a result of that, he fell down and the appellant-accused ran away with Gupti. It is required to be noted that the incident took place in broad day light at about 9:45 a.m. and the victim and the appellant-accused are of same community and, therefore, question of misidentification may not be arisen. Not only that, the prosecution has able to prove the same by way of other independent corroborative evidence viz., clothes alleged to have been worn by the victim at the time of incident and same has been seized by way of seizure panchnama and same panchnama has been proved by way of examining both the panchas as well as Investigating Officer, wherein it has been established that blood stains and cut marks have been found on the clothes alleged to have been worn by the deceased and the appellant-accused and same have been sent to FSL and expert i.e. P.W.No.4 viz., Hashmukh Modi, Exh.10 has given opinion also. He has proved the cut mark as well as muddamal. As per the FSL report, cut mark has been established and the blood found on the muddamal Gupti was of human blood group and of group 'B'. The argument advanced by the learned counsel for the appellant-accused is that the blood group of the deceased as

well as the victim are the same, but further argument advanced by him is not required to be accepted that the Investigating Officer has demanded the sample of blood of the deceased and same has been sprinkled upon the clothes of the appellant-accused as well as on gupti. We have compared the seizure panchnama as well as discovery panchnama, time etc., and we are of the opinion that the contention raised by the learned counsel does not get support from any corner of the evidence and nothing has been come out which turtle the evidence of expert. Merely because of the fact that the blood group of the victim as well as the appellant-accused is the same, whole evidence cannot be discarded, more particularly, when the cut marks are there on clothes. When presence of the appellant-accused along with the weapon has been established by the evidence of independent witnesses, we are unable to accept the arguments advanced by the learned counsel for the appellant-accused regarding the sprinkling of blood on the clothes of the deceased. Once presence of the appellant-accused along with the weapon and role has been established by way of independent witnesses and the prosecution got support from the scientific evidence of doctor then, it cannot be

said that there are no eyewitnesses and circumstantial evidence is not trustworthy. As such, here, the question of circumstances cannot be arisen at all because other available evidence are scientific evidence and that is on the basis of muddamal seized and the prosecution got support by way of said evidence. Not only that, even motive is also proved by the prosecution by way of bringing certified copy of the chapter case which is alleged to have been filed by the victim against the present accused persons. As far as injuries are concerned, all are on the vital parts of the body of the deceased and when the witnesses have deposed, they may not depose on the basis of P.M. Note, but they may depose what they have seen and, therefore, if one or two injuries have been narrated by the doctor on the stomach, chest etc., it does not affect the case of the prosecution because he is not witness of incident. On the contrary, he is a layman and therefore, he has categorically deposed that other injuries punctured the lung and heart and, therefore, we do not find any difference between the evidence of doctor as well as eyewitness. In short, the prosecution has proved the case against the appellant-accused beyond reasonable doubt including motive.

17. It is required to be noted that much have been argued by the learned counsel for the appellant-accused regarding the blood group of the appellant-accused as well as deceased on the ground that at the time of performing postmortem on the dead body of the deceased, the Investigating Officer has requested the doctor for blood sample of the deceased and same has been sprinkled upon the clothes of the appellant-accused as well as upon the muddamal Gupti. We have gone through the evidence on record and it shows that a request has been made by the Investigating Officer to Medical Officer by way of Exh.42, which is at page no.75 for the purpose of obtaining blood sample of the accused. Not only that, as per the forwarding letter written by the Investigating Officer to FSL, Exh.47 page no.81, more particularly, on page no.84, report page no.4, Sample No.P shows that even blood sample which has been sent to FSL and which has been examined by the FSL is of the appellant-accused. In view of the above, the contention raised by the learned counsel for the appellant-accused that the blood sample of the deceased has been collected and sprinkled on the clothes of the deceased does not get support from any corner and, hence, it can be said to be an

imagination on the part of the learned counsel and, hence, it is required to be rejected. Thus, the prosecution has proved by way of FSL evidence that the clothes seized from the body of the victim and the accused bore blood stains and cut marks and they are the blood group of the deceased which is group 'B' which support the say of the prosecution.

18. We are not discussing the evidence of each witness in detail in view of the observations made by the Hon'ble Apex Court in the case of **STATE OF KARNATAKA VS. HEMAREDDY** reported in **AIR 1981 SC 1417** which reads as under:-

> ".... This court has observed in Girija Nandini Devi V. Bigendra Nandini Chaudry (1967) 1 SCR 93: (AIR 1976 SC 1124) that it is not the duty of the appellate court when it agrees with the view of the trial Court on the evidence to repeat the narration of the evidence or to reiterate the reasons given by the trial Court expression of general agreement with the reasons given by the Court the decision of which is under appeal, will ordinarily suffice."

19. In view of the above, there is no substance in the contentions raised by the learned counsel for the appellant-accused and this appeal is required to be dismissed.

20. The appeal is hereby dismissed.

(R.P.DHOLAKIA, J.) (H.N.DEVANI, J.)

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